

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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CHRISTOPHER CHARLES and DARREN PRUM, special administrators of the estate of Baby Boy Charles, born December 31, 2005, and died August 4, 2006; MORGAN CHARLES, on behalf of the deceased BABY BOY CHARLES.

Case No.: 2:07-cv-01212-RLH-GWF

Plaintiffs,  
)  
vs.  
)  
MELANIE OCHS, individually; CLARK  
COUNTY DEPARTMENT OF FAMILY  
SERVICES; and COUNTY OF CLARK, a  
political subdivision of the State of Nevada,  
)

## ORDER

(Motion for Summary Judgment–#159;  
Motion for Summary Judgment–#167)

Defendants.

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Case No.: 2:08-cv-001146-KJD-GWF  
(consolidated with Case No.: 2:07-cv-01212-RLH-GWF)

Plaintiffs,  
vs.

MAPLE STAR NEVADA, a Nevada corporation; JENNIFER ERBES, individually and in her official capacity,

## Defendants.

1                   Before the Court is Defendants Maple Star Nevada and Jennifer Erbes' **Motion for**  
 2 **Summary Judgment** (#159), filed October 25, 2010, and Defendant County of Clark's **Motion**  
 3 **for Summary Judgment** (#167), filed December 1, 2010. The Court has also considered all of  
 4 the oppositions, replies, and other pleadings filed in connection with these motions.

5                   **BACKGROUND**

6                   This action arises out of the tragic death of a child named Baby Boy Charles.  
 7 Defendant Melanie Ochs, Baby Boy Charles' foster mother, was allegedly changing his diaper on  
 8 her washing machine when, distracted by her other children, she turned her attention away from  
 9 Baby Boy Charles. While she was gone Baby Boy Charles fell off the washing machine, suffered  
 10 traumatic injury, and subsequently died. On September 6, 2007, Plaintiffs filed suit in this Court  
 11 asserting claims for civil rights violations under 42 U.S.C. § 1983 and for negligence.

12                  Defendant Maple Star is a private company that supervises the care of foster  
 13 children and Defendant Jennifer Erbes is a social worker who is employed by Maple Star. Maple  
 14 Star and Erbes filed a motion for summary judgment on October 25, 2010, arguing that summary  
 15 judgment was proper as to them for both the negligence and § 1983 claims. Defendant Clark  
 16 County has also filed a motion for summary judgment. For the reasons discussed below, the Court  
 17 denies both motions.

18                   **DISCUSSION**

19                  **I. Motion for Summary Judgment Legal Standard**

20                  Summary judgment is proper when "the pleadings, depositions, answers to  
 21 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
 22 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
 23 of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis  
 24 on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material"  
 25 only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587

1 (1986). The party moving for summary judgment has the burden of showing the absence of a  
 2 genuine issue of material fact, and the court must view all facts and draw all inferences in the light  
 3 most favorable to the non-moving party. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th  
 4 Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

5 Once the moving party satisfies the requirements of Rule 56, the burden shifts to  
 6 the party resisting the motion to “set forth specific facts showing that there is a genuine issue for  
 7 trial.” *Anderson*, 477 U.S. at 256; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The non-  
 8 moving party “may not rely on denials in the pleadings but must produce specific evidence,  
 9 through affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*  
 10 *Hosp., Inc.*, 929 F.2d 1404 (9<sup>th</sup> Cir. 1991), and “must do more than simply show that there is some  
 11 metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

12 **II. Maple Star and Jennifer Erbes’ Motion for Summary Judgment**

13 **A. Negligence**

14 Plaintiffs’ third cause of action is for negligence against Clark County, Jennifer  
 15 Erbes, and Maple Star. In Nevada, a negligence cause of action generally requires that: (1) the  
 16 defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach  
 17 was the legal cause of the plaintiff’s injury; and (4) the plaintiff suffered damages. *Scialabba v.*  
 18 *Brandise Const. Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996). The question of whether a duty to act  
 19 exists is a question of law for the court to decide. *Lee v. GNLV Corp.*, 22 P.3d 209, 212 (Nev.  
 20 2001). Plaintiffs claim that Defendants breached their duty by failing to comply with several state  
 21 statutes and administrative regulations. The statute relevant to this motion is NRS § 432B.220,  
 22 which imposes a duty upon certain persons, including social workers and persons employed by  
 23 child care establishments, who know or have reasonable cause to believe that a child has been  
 24 abused or neglected, to report the abuse or neglect to the proper authority.

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1                   Defendants Maple Star and Jennifer Erbes argue that summary judgment is proper  
2 because they did not owe a duty of care to Baby Boy Charles at the time of his death. Specifically,  
3 they argue that at the time of his death, Maple Star and Jennifer Erbes were no longer contracted to  
4 supervise the care of Baby Boy Charles. However, the Court disagrees. Although Maple Star and  
5 Erbes' contractual duty to protect Baby Boy Charles may have expired, their statutory duty under  
6 NRS 432B.220 did not expire. The Court therefore finds that genuine issues of material fact  
7 remain as to whether Maple Star and Erbes had a duty to Baby Boy Charles at the time of his  
8 death.

9                   Defendants Maple Star and Erbes also argue that summary judgment is proper  
10 because they did not breach the duty owed under NRS § 432 B.220. However, Plaintiffs have  
11 provided the Court with sufficient evidence to demonstrate that a factual dispute exists as to this  
12 element. Specifically, Plaintiffs point to Erbes' deposition testimony wherein Erbes admits that  
13 she knew that Baby Boy Charles suffered an injury to his face while in Defendant Ochs' care and  
14 she never investigated it or reported it. The Court finds that this evidence creates a factual dispute  
15 as to whether a reasonable social worker would have reported this injury to the proper authorities.  
16 Plaintiffs also point to several photographs depicting the condition of the inside of Baby Boy  
17 Charles' foster home. According to Plaintiffs, there is a factual dispute as to whether a reasonable  
18 social worker would report the messy condition within the house. However, these pictures were  
19 allegedly taken more than five days after Erbes last visited the foster home. Therefore, Plaintiffs  
20 fail to show that when Erbes last visited the foster house it was in the messy condition that is  
21 depicted in those photographs. Accordingly, the Court finds that these photographs are not  
22 sufficient to establish a factual dispute as to the element of breach. However, because there is a  
23 factual dispute as to whether or not Baby Boy Charles' facial injury should have been reported, the  
24 Court denies Maple Star and Erbes' motion for summary judgment on this claim.

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1                   **B.       Section 1983**

2                   Plaintiffs' first cause of action is a § 1983 claim against all Defendants except Ochs  
 3 and Tokarski, the foster parents. Section 1983 provides a remedy to individuals whose  
 4 constitutional rights have been violated by persons acting under color of state law. 42 U.S.C. §  
 5 1983. Plaintiffs claim that these Defendants deprived Baby Boy Charles of his Fifth and  
 6 Fourteenth Amendment right to be provided with basic human needs and to be free from  
 7 unjustified pain and suffering, mental anguish, and to live without threat to his personal safety  
 8 while in Defendants custody. Plaintiffs also claim that Defendants deprived them of their Fifth  
 9 and Fourteenth Amendment right to continued familial association with Baby Boy Charles.

10                  In order to establish municipal liability under § 1983, Plaintiffs must prove that  
 11 Defendants were enforcing a government policy or custom when the alleged § 1983 injury  
 12 occurred. *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978). There are several ways to  
 13 establish the existence of a government policy or custom. Of course, if there actually is a formally  
 14 adopted policy or custom that causes constitutional violations then there is municipal liability.  
 15 *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–82, n.10, (1986). Additionally, unconstitutional  
 16 conduct by those with final authority for making decisions in the municipality constitutes a policy  
 17 or custom. *Id.* at 483–84. And similarly, if authorized decision makers approve or ratify the  
 18 unconstitutional behavior of a subordinate there is municipal liability. *Trevino v. Gates*, 99 F.3d  
 19 911, 918 (9th Cir. 1992).

20                  Maple Star and Erbes argue that summary judgment is proper because Plaintiffs  
 21 have failed to show triable issues of fact that Maple Star enforces a custom or policy which led to  
 22 the alleged § 1983 violations. However, Plaintiffs point to the deposition testimony of Barbara de  
 23 Castro, Maple Star's Regional Director, wherein De Castro testifies that she was aware that Maple  
 24 Star did not report the facial injury sustained by Baby Boy Charles. The Court finds that this  
 25 knowledge is sufficient evidence to create genuine issues of material fact that Maple Star ratified  
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1 Erbes failure to properly report said injury. As such, the Court denies Defendants Maple Star and  
 2 Erbes' motion for summary judgment.

3 **III. County of Clark's Motion for Summary Judgment**

4 **A. Negligence**

5 Plaintiffs' fourth claim is for negligence against Clark County. Clark County  
 6 argues that summary judgment is proper as to this claim because Clark County did not owe a duty  
 7 to Plaintiffs or Baby Boy Charles. The Court disagrees. Clark County owed a duty to Baby Boy  
 8 Charles under both NRS § 432B.220 and the common law. First, as stated above, NRS §  
 9 432B.220 imposes a duty upon certain persons, including social workers and persons employed by  
 10 child care establishments, who know or have reasonable cause to believe that a child has been  
 11 abused or neglected, to report the abuse or neglect to the proper authority. Therefore, the Clark  
 12 County social workers assigned to supervise the Ochs residence would be obligated to report abuse  
 13 or neglect under this duty. As such, Clark County had a duty to Baby Boy Charles under NRS  
 14 432B.220.

15 Second, the Court finds that Clark County owed a duty to Baby Boy Charles arising  
 16 out of the special relationship that existed between Clark County and Baby Boy Charles. In  
 17 general, "no duty is owed to control the dangerous conduct of another or to warn others of the  
 18 dangerous conduct." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1280–81  
 19 (Nev. 2009). However, Nevada recognizes an exception to this rule when (1) there is a special  
 20 relationship between the parties, and (2) the harm created by the dangerous conduct is foreseeable.  
 21 *Id.* Here, the Eight Judicial District Court committed Baby Boy Charles to the protective custody  
 22 of Clark County, and Clark County supervised the care of Baby Boy Charles in Ochs' residence.  
 23 Therefore, a special relationship existed between Clark County and Baby Boy Charles.  
 24 Furthermore, Plaintiffs have provided the Court with sufficient evidence to establish that Baby  
 25 Boy Charles' death was foreseeable. For example, John Forbes, a Clark County social worker  
 26 assigned to Baby Boy Charles, was aware of the fact that Baby Boy Charles sustained a facial

1 injury while in Ochs' care. Also, Dana Papania, another Clark County employee, reported to Child  
 2 Haven (a part of the Clark County Department of Family Services) that Defendant Ochs would  
 3 leave a newborn baby in a car parked in the garage overnight because the baby's crying would  
 4 bother her. This and other conduct by Ochs makes Baby Boy Charles' death foreseeable.  
 5 Therefore, the Court finds that Clark County owed a duty to Baby Boy Charles. Furthermore, the  
 6 Court finds that a factual dispute exists as to whether or not Clark County was the cause of Baby  
 7 Boy Charles' death. Accordingly, the Court denies Clark County's motion for summary judgment  
 8 on this claim.

9 **B. § 1983**

10 Defendant Clark County argues that summary judgment is proper as to this claim  
 11 for several reasons; the Court will deal with each individually.

12 **1. Violation of a Constitutional Right**

13 In order to properly establish a claim under § 1983, the plaintiff must show that the  
 14 defendant/state actor violated a constitutional right. Clark County argues that Plaintiffs cannot  
 15 establish a violation of a constitutional right because Plaintiffs rely upon state law for their claims,  
 16 the violation of which does not trigger a constitutional deprivation. The Court disagrees.  
 17 Plaintiffs § 1983 claim is based upon Baby Boy Charles' constitutional right to life under the Due  
 18 Process Clause of the U.S. Constitution. Baby Boy Charles' right to life was not created by a state  
 19 statute; it was created by the United States Constitution. Accordingly, if, as Plaintiffs allege, Clark  
 20 County violated that right, that violation would constitute a proper basis for a § 1983 claim.

21 **2. Policy or Custom; Deliberate Indifference**

22 As discussed above, in order to establish municipal liability under § 1983, Plaintiffs  
 23 must prove that Defendants were enforcing a government policy or custom when the alleged  
 24 § 1983 injury occurred. *Monell*, 436 U.S. at 694. Clark County argues that summary judgment is  
 25 proper because Plaintiffs cannot establish a policy or custom. The Court disagrees. If authorized  
 26 decision makers approve or ratify unconstitutional behavior, that is sufficient to establish a policy

1 or custom. *Trevino*, 99 F.3d at 918. In this case Ochs reported Baby Boy Charles' facial injury to  
 2 John Forbes, the Clark County caseworker assigned to Baby Boy Charles, and he made a note of  
 3 the incident. However, no investigation into this incident was ever made by Forbes or Clark  
 4 County. This is sufficient evidence to create a factual dispute as to whether or not Clark County  
 5 ratified Forbes decision not to investigate the incident. As such, summary judgment is improper.

6 Next, to establish municipal liability, a plaintiff must show that defendant's custom  
 7 or policy amounted to deliberate indifference to their constitutional rights. *Burke v. County of*  
 8 *Alameda*, 586 F.3d 725, 731 (9th Cir. 2009). Clark County also argues that its alleged custom or  
 9 policy did not amount to deliberate indifference. However, the Court finds that a factual dispute  
 10 exists as to whether Clark County's failure to investigate Baby Boy Charles' facial injury  
 11 amounted to deliberate indifference.

12 **3. Policy is Moving Force Behind Constitutional Violation**

13 To establish municipal liability, a plaintiff must also show that defendant's custom  
 14 or policy was the moving force behind the constitutional violation. *Id.* Clark County argues that  
 15 Plaintiffs cannot establish this requirement because Baby Boy Charles' death was an accident and  
 16 not the cause of any constitutional violation. However, the Court finds that a reasonable juror  
 17 could find that the alleged accident leading to Baby Boy Charles' death would not have occurred if  
 18 Clark County would have properly supervised his care. Accordingly, a factual dispute exists as to  
 19 this issue as well.

20 Accordingly, the Court finds that a material factual dispute exist with respect to  
 21 Plaintiffs' first cause of action—the § 1983 claim against all Defendants except Ochs and  
 22 Tokarski. Therefore, the Court denies Clark County's motion for summary judgment.

23 **C. § 1983 Failure to Provide Adequate Training Claim**

24 Plaintiffs second cause of action alleges that Clark County has failed to adequately  
 25 provide training to foster care social workers and supervisors. Clark County argues that summary  
 26 judgment is proper because Plaintiffs have failed to show sufficient facts to support such a claim.

1 However, in the Addendum (#193) to Plaintiffs' opposition, Plaintiffs set forth the deposition  
2 testimony of Harold Franklin, a former employee of Clark County's Department of Family  
3 Services and one of the caseworkers assigned to Baby Boy Charles, wherein Mr. Franklin testified  
4 as to the lack of proper training he received while he worked for Clark County. For example, Mr.  
5 Franklin states that he received almost no formal training at all, and was forced to learn his duties  
6 "on the job" from his co-workers. Mr. Franklin also states that he was never given a full copy of  
7 Clark County's policies and procedures for his job. This testimony raises a factual dispute as to  
8 whether or not Clark County failed to adequately train its foster care social workers. Accordingly,  
9 the Court denies Clark County's motion for summary judgment.

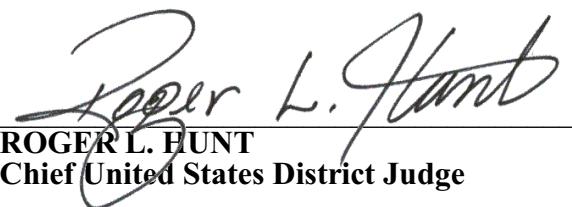
10 **CONCLUSION**

11 Accordingly, and for good cause appearing,

12 IT IS HEREBY ORDERED that Defendants Maple Star Nevada and Jennifer  
13 Erbes' Motion for Summary Judgment (#159) is DENIED.

14 IT IS FURTHER ORDERED that Defendant County of Clark's Motion for  
15 Summary Judgment (#167) is DENIED.

16 Dated: February 3, 2011

  
17 **ROGER L. HUNT**  
18 Chief United States District Judge